SINGAPORE REPORTS

HAW PAR BROS. (PTE) LTD. v. DATO AW KOW

[C.A. (Wee Chong Jin C.J., Chua & Kulasekaram JJ.) September 12, 1973]

[Singapore — Civil Appeal No. 57 of 1972]

Companies — Directors — Right of inspection of accounts and other records — Director ceasing to hold office — Companies Act (Cap. 185), s. 167.

This was an appeal against the decision of Choor Singh J. reported at [1972] 2 M.L.J. 225. The question before the Court of Appeal was whether or not, where an order for inspection has been made by a court under section 167(5) of the Companies Act, the order continues in full force and effect after the director of a company ceases to be a director.

Held: (1) an ex-director's right ceases once he is no longer a director. It follows that in principle an agent's right to inspect which has been granted by an order of court made under section 167(5), a right which is dependent upon his principal's right under section 167(3), must also cease once his principal is no longer a director;

(2) the order did not amount to a true injunction either interim or perpetual as it did not specify any time limit within which the accounts and other records of the company were to be open for inspection.

Cases referred to:-

(1) *Edman* v. *Ross* (1922) 22 S.R. (N.S.W.) 351.

(2) *Funerals of Distinction Pty. Ltd.* [1963] N.S.W.R. 614.

(3) *Eastern Trust Co.* v. *McKenzie, Mann & Co. Ltd.* [1915] A.C. 750.

COURT OF APPEAL.

Denis Murphy and *Salahuddin Ghouse* for the appellants.

A. Lloyd Q.C. and *K. A. O'Connor* for the respondent.

Wee Chong Jin C.J. (delivering the judgment of the court): In November 1971 the respondent as a director of the appellant company requested inspection, accompanied by an approved company auditor, of the accounting and other records of the company which are required to be kept pursuant to section 167 of the Companies Act (Cap. 185). His request being refused he applied to the High Court by way of an Originating Summons No. 353 of 1971 on 17th December 1971 for an order under section 167(5) of the Act. The appellant company resisted the application but an order in terms was made on 22nd December 1971. The order did not specify a time limit during which the accounting and other records should be kept open for inspection by Mr. Curran, the approved company auditor named in the order and the order did not give liberty to the parties to apply. The appellant company did not, understandably, appeal against the order.

Mr. Curran began inspection shortly after the order was made and continued his inspection until 22nd June 1972 when he left Singapore on leave. While he was absent from Singapore, shareholders holding more than two-thirds of the issued shares of the appellant company by a letter dated 20th July 1972 notified the appellant company that they, exercising their right under article 5(2) of the Articles of Association had removed the respondent as a director and the respondent was duly notified by a letter from the secretary of the appellant company dated 2nd August 1972 that he was no longer a director. On 17th August 1972 the solicitors for the appellant company wrote to the solicitors for the respondent informing them that Mr. Curran was no longer free to inspect the accounts because the order of 22nd December 1971 "had lapsed" on the respondent ceasing to be a director.

Thereupon, the respondent commenced the present action intituled Suit No. 1815 of 1972 on 18th August 1972 claiming, *inter alia*: —

"1. an injunction to restrain the defendants or either of them or the officers, servants or agents of the first defendant, from preventing or obstructing John Bertram Curran, an approved Company Auditor, from inspecting the accounting and other records of the first defendant pursuant to an Order of this defendant pursuant to an Order of this Honourable Court made on the 22nd day of December, 1971;
2. a declaration that notwithstanding the purported removal of the plaintiff as a director of the first defendant company the said Order remains valid and in full force and effect;"

On the same day, 18th August 1972, the respondent obtained *ex parte* upon the usual undertaking as to damages an interim injunction against the appellant company and its secretary restraining them until the hearing of a motion returnable on 1st September 1972 or until further order from preventing or obstructing Mr. Curran from inspecting the accounting and other records of the appellant company pursuant to the order of 22nd December 1971.

The motion was eventually heard on the 11th, 12th and 22nd September 1972 before Choor Singh J. who had granted the interim injunction on 18th August 1972 and on 14th October 1972 Choor Singh J. made an order continuing the interim injunction against the appellant company until 31st December 1972 but ordered that the secretary be struck out as a defendant in the action. The appellant company now appeals against the order made by Choor Singh J. on 14th October 1972, the order having been stayed until the determination of the appeal.

In his judgment Choor Singh J. said that the sole reason why he granted the *ex parte* injunction prohibiting the appellant company from interfering with the inspection by Curran of the accounting and other records of the appellant company pursuant to the order of court made on 22nd December 1971 in O.S. 353 of 1971 was to enforce compliance with the order which the appellant company were flouting. He held that on the true construction of section 167 of the Companies Act an inspection order obtained by a director does not *ipso facto* lapse upon the director ceasing to be a director but "remains in full force until it is discharged, rescinded or varied by the court upon the application of either party." He further held that on such application the court has a discretion to allow the inspection to continue, notwithstanding that the director has been removed, if the circumstances of the case so warrant. He was of the opinion that the right expressly conferred by section 167(3) on a director to inspect the accounts and other records of a company would be illusory and would lead to unreasonableness and injustice if section 167(3) were to be construed to confer the right to inspect on a director only so long as he is and continues to remain a director of the company.

The material provisions of section 167 of the Companies Act read as follows: —

"167. (1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.

(3) The records referred to in subsection (1) of this section shall be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors.

(5) The court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director."

Mr. Murphy for the appellant company contends that Choor Singh J. was wrong in law in holding that section 167(3) confers upon a director the right to continue to inspect a company's records after he has ceased to be a director. He says that at common law a director has a right to inspect and take copies of documents belonging to his company because this right is essential to the proper performance of a director's duties and that section 167(3) is merely declaratory of that common law right and ought not to be construed to extend the right of inspection to a person who having ceased to be a director has no common law right of inspection unless he asserts that right as a shareholder of the company which is not the case here. It follows, so Mr. Murphy contends, that section 167(5) does not confer power on a court to grant the right to inspect to an agent of a person who has ceased to be a director and that any right to inspect granted by a court to an agent of a director *ipso facto* lapses when the director ceases to be a director.

Mr. Murphy relies on two Australian cases. In the earlier case (*Edman* v. *Ross*[1]) Street C.J. of the Supreme Court of New South Wales held that a director is entitled as of right to personally inspect and take copies of documents belonging to the company and that this right can be exercised by a director through a proper agent making the inspection for him. In his judgment Street C.J. after examining the English authorities indicated that the reasons upon which the right of a director to inspect and, if necessary, take copies of documents belonging to a company are the nature of a director's duties and to enable him to properly perform his duties as a director.

In the later case, *Funerals of Distinction Pty Ltd.*[2] Jacobs J. had before him an application by a director under section 102 of the Companies Act 1936 of New South Wales for an order that the accounts of Funerals Distinction Pty. Ltd. should be open for inspection by an accountant acting for him as a director of the company. Section 102 of that Act provides, *inter alia*, as follows: —

"(2) The accounts shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open to inspection by any director.

(5) The court may in a particular case order that such accounts shall be open to inspection by an accountant acting for a director but only upon an undertaking in writing being given to the court that information acquired by such accountant shall not be disclosed by him save to such director."

Jacobs J. held that section 102(5) being in aid of the absolute right of a director under section 102(2) it would need a very strong case to be made out to refuse an order under section 102(5). He next considered whether he should exercise his narrow discretion to refuse granting an order for inspection under section 102(5) where, *inter alia*, it appeared likely that the applicant might cease to be a director within a short time and decided to make an order to come into effect at a later date, provided that at that date the applicant shall still be a director of the company. In so doing he took into account the precarious position of the applicant "because once he ceases to be a director his interest in the inspection in his capacity as director ... would cease."

In our opinion these Australian cases lend some support to the construction which the appellant company seek for under our section 167(3) and (5). It is to be observed that our section 167 is similar to section 102 of the Companies Act 1936 of New South Wales. In the final analysis, however, the meaning *i.e.* the intention of the legislature is primarily to be sought in the words of the section itself read with the statute as a whole. It seems to us clear that section 167(3) gives an absolute right to inspect the accounting and other records required to be kept by a company and its directors under section 167(1) only to persons who *are* the then directors of the company. It is clear that section 167(3) cannot be successfully invoked by an ex-director. In our opinion where an ex-director wishes to inspect such accounting and other records of a company he cannot rely on section 167(3) and must rely on other grounds because it is clear law that an ex-director, as such, has no proprietory, managerial or other similar interest in the accounting and other records of a company.

It seems to us clear also that section 167(5) is in aid of the right to inspection which is given to a director by section 167(3) and therefore the court has no power under section 167(5) to order that the accounting and other records of a company should be open for inspection on behalf of an ex-director of that company.

The more difficult question, and that is the question before us, is whether or not, where an order for inspection has been made by a court under section 167(5), the order continues in full force and effect after a director of a company ceases to be a director. It seems to us that we must first consider whether a director who has ceased to be a director has under section 167(3) the continued right of personal inspection and as we have earlier said an ex-director's right ceases once he is no longer a director. It follows, in our opinion, that in principle an agent's right to inspect which has been granted by an Order of Court made under section 167(5), a right which is dependent upon his principal's right under section 167(3), must also cease once his principal is no longer a director.

It is, however, contended by Mr. Lloyd, counsel for the respondent, that no final determination had been arrived at as to whether or not the "purported"

removal of the respondent as a director was valid and the court ought not to prejudge this issue. We are not able to accept this contention. In our opinion it was necessary for the respondent to establish, *inter alia*, a *prima facie* case that the shareholders had no power to remove him from his directorship or that the shareholders had not exercised their right in accordance with the Articles of Association of the appellant company to support his claim for an interim injunction in the present proceedings. Article 5(2) provides that the holders of two-thirds of the issued shares may by notice in writing to the company remove any director from office. This power was exercised by shareholders holding over two-thirds of the issued shares and was exercised in accordance with the terms of article 5(2). What their motives were are entirely irrelevant. Whether or not the effect of the exercise of the right of removal would be to nullify the order of court enabling Mr. Curran to inspect the accounting and other records is also entirely irrelevant. In any event it seems to us material that they did not exercise their indubitable right under article 5(2) until seven months after the order of court and that Mr. Curran had had inspection for at least six months. It also seems to us a relevant consideration that the appellant company as a legal entity separate from its shareholders cannot be blamed for the acts of its shareholders, however blameworthy those acts may be. In our opinion there can really be no reason for doubt that the respondent had been validly removed as a director of the appellant company.

Mr. Lloyd's main contention is that the order of court made on 22nd December 1971 must be obeyed even after the respondent had ceased to be a director. He contends that the order of court remains in force and must be obeyed where there is no express term that the order would lapse on the respondent ceasing to be a director of the appellant company or where a term cannot be implied that the order would lapse in the event of the respondent ceasing to be a director. He contends that the proper course in the present case was for the appellant company to apply to discharge the order of court made on 22nd December 1971 or to apply to appeal out of time against the order and this it has not done. He contends that an order of court cannot be ignored and must be obeyed by the party against whom it is directed so long as it stands and he relies on the following passage in the judgment of the Privy Council in *Eastern Trust Company* v. *McKenzie, Mann & Co., Limited*[3] at pages 760-761: —

"Their Lordships, with all respect, differ entirely from the statements in Idington J.'s judgment, that an injunction under which the hand giving may be innocent, and the hand receiving guilty, would be an anomaly not in accord with the policy of the law which developed the power of injunction. Such an injunction is, on the contrary, in accordance with ordinary practice and wellsettled principles, and their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts; it is clear that if a claimant to an inalienable Government pension succeeded in persuading the court in this country that he had a prima facie claim to it, and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order, although the Crown was no party to the litigation, and paid in disregard or ignorance of the order."

In that case the injunction restraining R. G. Hervey from receiving payments of money was an interim injunction pending the final determination of the action whereas in the present case the order in question was made in proceedings commenced by way of an Originating Summons, the relief sought was for an order under section 167(5) and an order was made in terms of the application. In our opinion the order did not amount to a true injunction either interim or perpetual. The order did not specify any time limit within which the accounts and other records of the appellant company were to be open for inspection by Mr. Curran. It was clearly not intended to be in force perpetually. It was clearly not an interim or interlocutory order. In our opinion it must necessarily be implied that the court in making the order could not have intended to give Mr. Curran the right to inspect the accounts beyond the date when the respondent ceased to be a director of the appellant company and had therefore no longer any statutory right to inspect for the simple reason that it must be presumed that no court could have intended its order to continue to be in force if to continue it in force would be beyond the statutory power of the court.

For all these reasons we are of the opinion that the appeal should be allowed as the interim injunction ought not to have been granted. The appellants should have their costs here and below.

Appeal allowed.

Solicitors: *P. T. Wong & Co.; Drew & Napier.*

KONG SING & ANOR. v. KIM KUAN (PTE) LTD.

[O.C.J. (Chua J.) November 14, 1973]

[Singapore — District Court of Appeal No. 47 of 1971]

Moneylenders — Promissory note — Attestation — Promissory note in both English and Chinese — Failure to explain to borrower — Moneylenders Ordinance (Cap. 220) ss. 16 & 30.

By section 16(1) of the Moneylenders Ordinance a promissory note to be enforceable must be in the English language and under section 30(1) it is the promissory note in the English language that has to be explained to the borrower by certain designated officers and persons and attested if the borrower does not understand the English language.

In this case the promissory note was both in English and Chinese. The borrower did not understand English and the promissory note was not attested in accordance with the statutory requirements of the Act.

Held: the promissory note was void.

DISTRICT COURT APPEAL.

J. G. Advani for the appellant.

R. Ramason for the respondent.

Chua J.: This appeal arises from an action in which the respondents, moneylenders, were plaintiffs and the appellants were defendants. The respondents claimed from the appellants the sum of $3,037 due on a demand promissory note executed by the appellants in favour of the respondents for the sum of $3,000